IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Case No. 80-999

Annie Green,

Petitioners,

v.

Board of Examiners of
Nursing Home Administrators,

Respondents.

ON WRIT OF CERTIORARI FROM THE
COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Page

SUMMARY OF ARGUMENT....1
STATEMENT OF THE CASE....2
ARGUMENT....8

RESPONDENT BOARD OF EXAMINERS OF NURSING HOME ADMINISTRATORS DID NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF PETITIONER WHEN IT REQUIRED HER TO PASS AN EXAMINATION FOR LICENSURE AS A NURSING HOME ADMINISTRATOR PURSUANT TO STATE LAW 8

CONCLUSION 15
CERTIFICATE OF SERVICE....16

INDEX TO AUTHORITIES

Cases:

Blake v. City of Los Angeles,
595 F.2d 1367 (9th Cir., 1979)....14
Columbus Board of Education v. Pennick,
443 U.S. 449 (1972) 2, 12
Davis v. Washington,
348 F. Supp (D.C., 1972) 10
Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975) 2, 13
Massachusetts Board of Retirement v. Murgia,
427 U.S. 307 (1976) 1, 9, 10
Miami County v. Dayton,
(1915), 92 Ohio St. 215, 110 N.E. 726....12
Personnel Administrator of Massachusetts v. Feeney,
U.S. (1979) 11, 12
Richardson v. Pennsylvania Department of Health,
561 F.2d 489 (3rd Cir., 1977)....12
Scott v. City of Anniston, Alabama,
597 F.2d 897 (5th Cir., 1979)....14
Vanguard Justice Society v. Hughes,
471 F. Supp. 670 (Md., 1979)....14
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 11

INDEX TO AUTHORITIES *contd.*

Page

Washington v. Davis,
426 U.S. 229 (1976) ..... 2, 10 - 14
Woodard v. Virginia Board of Bar Examiners,
420 F. Supp. 211 (E.D. Va., 1976), *aff'd,* 598 F.2d
1345 (9th Cir., 1979) 2, 13, 14

Statutes:

42 U.S.C. Section 1396g(d) 3
42 U.S.C. Section 1396g(e) 7
42 U.S.C. Section 2000e *et seq.* Title VII of the Civil
Rights Act of 1964 13
Massachusetts Gen. Laws C 32, Section 26(3)(a)(1969) 9
Ohio Revised Code Section 119.12 ..... 5, 8
Ohio Revised Code Section 3721.03 5
Ohio Revised Code Section 4751.02 2
Ohio Revised Code Section 4751.02(A) 4, 12
Ohio Revised Code Section 4751.02(B) 4
Ohio Revised Code Section 4751.04(A)(2) 2
Ohio Revised Code Section 4751.06(B) 3
Ohio Revised Code Section 4751.06(C) 3
Ohio Revised Code Section 4751.06(F) 7
Ohio Revised Code Section 4751.99 4

Regulations:

No. NH-1-08 of the Board of Examiners of Nursing Home
Administrators (1971) 7
Section 4751-1-06 of the Ohio Administrative Code 13

Other:

45 C.F.R. Section 252.44(a) 7
133 Ohio Laws 1380 2

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SUMMARY OF ARGUMENT

1. Petitioner alleges that because of her somewhat advanced age, she is entitled to strict judicial scrutiny of Respondent's action under the 5th and 14th Amendments to the United States Constitution. However, no distinction or classification exisited in this case. Furthermore, this Court has held that classifications based upon age are not entitled to the same treatment as those based on race or national origin. **Massachusetts Board of Retirement v. Murgia,** 427 U.S. 307 (1976).

2. Petitioner's claim that her Constitutional rights have been violated is based solely upon the testimony of one witness, who stated that the *type* of examination she had to take in order to obtain licensure as a nursing home administrator placed a burden upon her because of her race. This same witness

added that the test was job-related. This testimony, does not establish such a violation for there exists no illegality of purpose. **Washington v. Davis,** 426 U.S. 229 (1976); **Columbus Board of Education v. Pennick,** 443 U.S. 449 (1979).

3. Because of the nature of the examination in question – licensure of a nursing home administrator pursuant to state statute – the State of Ohio's interest in assuring that competent persons administer nursing homes outweighs Petitioner's claim that she qualifies for licensure without successful completion of the exam. **Goldfarb v. Virginia State Bar,** 421 U.S. 773 (1975). **Washington v. Davis,** 426 U.S. 229 (1976). State licensing examinations have withstood attacks upon their validity under Title VII of the Civil Rights Act of 1964 on the same grounds Petitioner alleges in this case. Since the burden upon Petitioners is greater when alleging a constitutional violation as opposed to claims arising out of Title VII, a claim that does not violate Title VII, as a matter of law, cannot violate the Constitution, as greater deference is given to the reasonable acts of administrative officers. **Woodard v. Virginia Board of Bar Examiners,** 420 F. Supp. 211 (E.D. Va., 1976), *aff'd,* 598 F.2d 1345 (4th Cir., 1979). **Washington v. Davis,** 426 U.S. 229 (1976). Contrary to Petitioner's claim, that Respondent should have taken steps to validate its test, the Constitution does not require validation of state licensing examinations. **Washington v. Davis,** 426 U.S. 229 (1976); **Woodard v. Virginia Board of Bar Examiners,** 420 F. Supp. 211 (E.D. Va., 1976), *aff'd,* 598 F.2d 1345 (4th Cir., 1979).

STATEMENT OF THE CASE

On March 12, 1970, the General Assembly of the State of Ohio enacted Chapter 4751 of the Revised Code.[1] This Chapter required for the first time that every nursing home in Ohio must be supervised by a licensed nursing home administrator.[2] An examination was required as a condition for licensure.[3] To

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1 Ohio amended Senate Bill No. 481, 133 Ohio Laws 1380.

2 Section 4751.02 of the Ohio Revised Code.

3 Section 4751.04(A)(2) of the Ohio Revised Code.

enable those persons operating nursing homes at that time to continue in operation pending the home's employment of a licensed administrator, provision was made for provisional licensing.[4] The duration of the provisional license was specifically tied to federal statute[5] under the terms of the state statute.[6] Accordingly, Petitioner, an elderly black female, administrator of the Christian Home for the Aged, located at 1454 Eastwood Avenue, Columbus, Ohio, applied for and received a provisional license from Respondent Board of Examiners of Nursing Home Administrators[7] on August 26, 1971. This license was issued to Petitioner on September 7, 1971. It stated in bold letters: "Provisional License - No. 421-P VOID AFTER June 30, 1972." A letter sent to Petitioner with the license informed her that she had to apply for and pass an examination to continue in business as a nursing home administrator after June 30, 1972.

On April 19, 1972, Petitioner applied for the examination for licensure as a nursing home administrator, and, on May 18, 1972, she took her test. BENHA informed her via letter that she failed to attain the legal passing grade on the examination. The results of Petitioner's examination were:

EXAMINATION QUESTIONS

	Total	Administration	Patient Care	Other Facts	Converted Grade
Maximum No.	150	58	57	32	–
No. You Answered Correctly	57	20	25	12	66

4 Sections 4751.06(B) and 4751.06(C) of the Ohio Revised Code, set forth at page 5 of Petitioner's Brief. References to Petitioner's Brief shall be designated "P".

5 Social Security Amendments of 1967, 81 Stat. 909(1968), 42 U.S.C. Section 1396g(d).

6 Section 4751.06(C) of the Ohio Revised Code. See P. 5.

7 Hereinafter referred to as "BENHA".

On June 30, 1972, Petitioner's provisional license expired by operation of law.[8] BENHA requested at this time that Petitioner inform them of the name of the licensed nursing home administrator for the Christian Home for the Aged. On July 26, 1972, she submitted a form, NOTICE OF EMPLOYMENT OF LICENSED AND REGISTERED NURSING HOME ADMINISTRATOR to BENHA, wherein she state that *she* was the licensed and registered administrator of this particular home.

BENHA informed Petitioner via letter dated August 18, 1972, that it had sent investigators to the Christian Home for the Aged to ascertain the identity of the licensed administrator under whose supervision the home was being operated. The letter further informed Petitioner that Ohio Law required a licensed administrator at the home,[9] that she could not engage in the practice of nursing home administration without a license,[10] and that her failure to comply with Ohio law would force BENHA to turn the matter over to her county prosecutor for criminal prosecution.[11]

In a letter to BENHA dated December 27, 1972, Petitioner finally requested a hearing before BENHA contending that her provisional license, under state statute, was still in effect. The hearing was held on February 16, 1973. At no time during this hearing did Petitioner in any way challenge the validity of the examination that she had failed.

On March 22, 1973, BENHA notified Appellant that it was moving to deny Petitioner's interpretation of Ohio law. This order was appealed to the Franklin County, Ohio, Court of Common Pleas[12] which sustained BENHA. The matter was appealed to the Franklin County, Ohio, Court of Appeals[13]

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8 See notes 5 and 6.

9 Section 4751.02(A) of the Ohio Revised Code.

10 Section 4751.02(B) of the Ohio Revised Code.

11 Section 4751.99 of the Ohio Revised Code.

12 Case No. 73CV-03-1104, unreported.

13 Case No. 76AP-825, unreported.

which reversed the Court of Common Pleas, holding that because BENHA had "moved" to deny Petitioner's interpretation of Ohio law, it's decision was not a final order and therefore the Court of Common Pleas was without jurisdiction to hear the appeal.[14] The Supreme Court of Ohio denied a Motion to Certify the Record on October 21, 1977, so the matter was remanded to BENHA.

On November 8, 1977, BENHA sent a second adjudication order to Petitioner, removing the ambiguity as to whether the Board denied Petitioner's requested interpretation or merely "moved" to do so. This order was appealed to the Court of Common Pleas for Franklin County.[15] At the same time, Petitioner was also appealing in the same Court[16] the order of Respondent, Dr. John H. Ackerman, Director of Health,[17] who had revoked her nursing home operator's license.[18] Because one of the bases for the Director's action was the failure of Petitioner to employ a licensed nursing home administrator at her facility, Petitioner moved to consolidate the two cases, which motion was granted.

At this stage of the proceedings Petitioner alleged for the first time that the licensure test she failed was discriminatory[19] and moved to be permitted to present additional evidence to support this claim.[20] This motion was granted, and on October 13, 1978, a hearing was held at which Petitioner produced a witness, Ayres G. Jed-Costa, a psycometrician employed by

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14 The Court of Appeals for Franklin County, Ohio, determined that the Court of Common Pleas was without jurisdiction to hear the appeal pursuant to Section 119.12 of the Ohio Revised Code.

15 Case No. 77CV-11-4977, unreported.

16 Case No. 77CV-04-1664, unreported.

17 Hereinafter referred to as "The Director".

18 See Section 3721.03 of the Ohio Revised Code.

19 In Petitioner's Reply Memorandum filed in Case No. 77CV-04-1664. Said Memorandum was dated March 21, 1978.

20 Under Section 119.12 of the Ohio Revised Code, parties to an administrative appeal may present additional evidence to the Common Pleas Court on the theory that it is "newly discovered".

Ohio State University, who testified that it was his opinion that passing the type of test employed by BENHA,[21] required a certain skill, in and of itself, and persons who lack experience and training in taking this type of test are under a disability. His conclusions were based on his experiences at the University.[22] Importantly, there was no testimony from Petitioner's expert that older persons as a distinct group or class were under any disability in taking this exam.

Petitioner offered no evidence that any person other than herself failed BENHA's examination. Dr. Jed-Costa performed no statistical analysis on this test of the failure rates of minorities compared to whites, nor of older persons as compared to younger ones. He also testified that the test was highly reliable and the questions it contained were job-related. BENHA also produced a witness, Dr. William Dowling, who testified that the examination was a job-related one rather than one of general intelligence, and that there was nothing in it which discriminated against a person on the basis of race or age. Obviously, Petitioner's opinion testimony has been completely rebutted by the actual facts of this case.

BENHA also presented the testimony of Nancy Lucas, who had been its Executive Secretary since March, 1971. She testified concerning the efforts made by BENHA to assist

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21 The test used by BENHA was a multiple choice examination preparted by the Professional Examination Service, (P.E.S.) 475 Riverside Drive, New York, New York. It contained questions on various topics relating to the operation of a nursing home, including patient care and administration of the facility. Petitioner correctly answered 38% of the questions and received a final score of "66".

22 See the decision from which Petitioner appeals Case No. 79AP-236, Court of Appeals, Franklin County, Ohio, found at P. A-7, particularly the discussion at P. A-13 – A-15.

provisional licensees in passing the licensure examination.[23] A course was made available in 1971 and 1972 at Ohio State University, free of charge, to all provisional licensees. It included practice exams and instructions on how to take the upcoming exam. The information taught in the course was the same information that was later covered in BENHA's exam. There was also a practice session before each exam. Provisional licensees were permitted to take the examination an unlimited number of times if need be to pass it.

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23 Section 4751.06(F) of the Ohio Revised Code at the time Petitioner took BENHA's examination provided:

> If the board issues a provisional license to any individual under this section, the Ohio Department of Public Welfare or any agency of the state government with which it contracts shall provide in the state during all of the period for which such provisional license remains in effect a program of training and instruction designed to enable all provisional nursing home administrators to attain the qualifications necessary for licensure as a nursing home administrator. For the purposes of this division, the Ohio Department of Public Welfare may receive and disburse federal funds received pursuant to the social security amendments of 1967, 81 Stat. 909 (1968), No. 42 U.S.C. 1396g(e).

Regulation NH-1-08 of BENHA provided:

Program of training and instruction.

> To provide a basis for future licensure reciprocity between this state and other states, and to provide that the content of programs of training and instruction contains sufficient amounts of appropriate information relating to the proper and efficient administration of nursing homes, *the detailed guideline categorization of the basic areas of the core of knowledge as set forth in section 252.44(i) of Part 242, Title 45,* as published in volume 25, no. 41 Part II of the Federal Register dated Saturday, February 28, 1980, *are hereby prescribed by the board for the approval of grants to Ohio for training and instruction programs for provisionally licensed nursing home administrators.* (Emphasis added).

The above-referenced section of the Code of Federal Regulations provided for a program of:

> . . . training and instruction *to enable all individuals who have been granted provisional licenses* under section 252.40(d) of this part *to attain the minimum qualifications necessary* to meet the State standards for licensure as nursing home administrators. 45 C.F.R. Section 252.44(a). (Emphasis added).

On April 5, 1979, the Court of Common Pleas filed Judgment against BENHA, holding that Green need not obtain a nursing home administrator's license because BENHA, through its examination, purposely discriminated against minorities and older applicants who were far removed from the formal education process.[24]

BENHA and the Director appealed this determination to the Franklin County Court of Appeals. In a decision rendered on October 4, 1979, the Court of Appeals reversed on the issue of discrimination, finding that Dr. Jed-Costa's testimony did not support the Court of Common Pleas conclusion that BENHA had engaged in purposeful discrimination.[25]

Petitioner filed a Motion to Certify the record with the Ohio Supreme Court in both cases, which was granted on February 8, 1980. Oral argument was presented on May 21, 1980. The Supreme Court of Ohio issued an order on June 18, 1980, which dismissed both appeals as being improvidently allowed. A motion for rehearing to the same Court was denied on July 24, 1980.

ARGUMENT

RESPONDENT BOARD OF EXAMINERS OF NURSING HOME ADMINISTRATORS DID NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF PETITIONER WHEN IT REQUIRED HER TO PASS AN EXAMINATION FOR LICENSURE AS A NURSING HOME ADMINISTRATOR PURSUANT TO STATE LAW.

Petitioner operated her nursing home, the Christian Home for the Aged under the auspices of a provisional nursing home

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24 This decision is found at P. A-36. Under Section 119.12 of the Ohio Revised Code, the Court of Common Pleas is to affirm an order of an administrative agency if it finds "that such order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modity the order(.)"

25 Case No. 79AP-236, unreported. The decision is found at P. A-7.

administrator's license from September 7, 1971, to June 30, 1972, when it expired by operation of law.[26] In order to remain licensed after June 30, 1972, it was necessary for Petitioner to take and pass a nursing home administrator's licensing exam given by BENHA. Petitioner took the exam on May 18, 1972, and failed to pass it. She is now arguing that her rights assured under the Fifth and Fourteenth Amendments to the United States Constitution have been violated because BENHA "knew or should have known that the examination would discriminate against older black persons."[27]

Petitioner contends that her age is a factor worthy of special scrutiny, stating that "(a)ge is an area clearly protected by the equal protection clause of the United States which should be clearly encompassed in the same classification and category as sex and race."[28] This Court has expressly addressed this issue and concluded to the contrary in **Massachusetts Board of Retirement v. Murgia.**[29] In discussing a statute which placed state policemen on mandatory retirement when they reach age 50,[30] this Court stated,

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.
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> . . .(O)ld age does not define a "discrete and insular group". . .in need of "extraordinary protection from the majoritarian

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26 See notes 5 and 6.

27 P. 12.

28 P. 13.

29 427 U.S. 307 (1976).

30 Mass. Gen. Laws Ann. C 32, Section 26(3)(a) (1969).

> political process." . . . Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny.[31]

Because this Court does not subject the elderly as a class to strict scrutiny, Petitioner's claim must stand or fall on whether or not she was discriminated against because of her race.

There is no evidence in the record that anyone other than Petitioner failed to pass the licensure exam given by BENHA. Petitioner's witness, who testified that the type of test used, in his opinion, had an adverse impact on black persons, also stated that the examination was indeed job-related. Petitioner is basing her entire claim that her constitutional rights have been violated upon this one piece of evidence. Contrary to her claim in this Court, the Court of Appeals for Franklin County, Ohio, did not decide a matter unresolved by this Court.[32] The court below correctly decided Petitioner's case on well-settled principals of constitutional law.

In **Washington v. Davis,**[33] this court refused to find a constitutional violation arising out of the Washington, D.C. Metropolitan Police Department's use of "Test 21"[34] as a condition for a promotion. The plaintiffs argued that this test served to exclude a disproportionately high number of black applicants. While noting that discriminatory purpose need not

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31 **Massachusetts Board of Retirement v. Murgia,** 427 U.S. 307, 313-14 (1976).

32 P. 11.

33 426 U.S. 229 (1976).

34 Test 21 is "an examination that is used generally throughout the federal service. It. . . is designed to test verbal ability, vocabulary, reading and comprehension." **Davis v. Washington,** 348 F. Supp. 15 (D.C., 1972).

be express to trigger a constitutional violation, and that such a violation may "be inferred from the totality of the relevant facts,"[35] this Court also stated disproportionate impact is "not the sole touchstone of an invidous racial discrimination forbidden by the Constitution."[36] To find that a challenged practice violates the conttitution, this Court concluded that it must be shown to be a "purposeful device to discriminate."[37]

Later cases of this Court have reaffirmed this principal.[38] "'Discriminatory purpose', however, implies more than intent as violition or intent as awareness of consequences. . . It implies that the decision maker. . .selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group."[39]

If BENHA had chosen to give this test to potential licensees "because of" its alleged desire to somehow discriminate against blacks and the elderly, it would not have gone to the effort of preparing a special course at Ohio State University to assist those about to take the exam. It would not have had a practice session prior to each exam nor would it have permitted those provisional licensees who failed the exam to take it as many times as need be in order to eventually pass. There is simply no concrete evidence in the record to indicate that this test was designed or administered with a purpose.

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35 **Washington v. Davis**, 426 U.S. 229, 242 (1976).

36 *Id.*

37 *Id.* at 246.

38 See **Village of Arlington Heights v. Metropolitan Housing Development Corp.**, 429 U.S. 252 (1977) and **Personnel Administrator of Massachusetts v. Feeney**, 442 U.S. 256 (1979).

39 **Personnel Administrator of Massachusetts v. Feeney**, 442 U.S. 256, 279 (1979). Citation and note omitted.

Petitioner's argument fails because it is based entirely upon her claim that BENHA "should have known" its test was discriminatory.[40] This she argues can be inferred from her witness' testimony about the adverse effects he believed this test would have on blacks. While the inevitability or foreseeability of consequences of a neutral rule may have some bearing upon the existence of discriminatory intent,[41] "in this inquiry — made as it is under the Constitution — an inference is a working tool, not a synonym for proof."[42] The only evidence of purpose Petitioner has is this inference of "foreseeability of consequences." Standing alone, it is not proof that BENHA has purposely violated the Constitution.[43]

There is another factor that undermines Petitioner's position, and that is the nature of the examination in question. This test was not a general intelligence test, or some other examination given by an employer to members of its work force as was the case in **Washington v. Davis.** This test is a state licensing examination. As an exercise of its police power,[44] for the protection of its citizens who reside in nursing facilities, the Ohio General Assembly chose to require the presence of a licensed administrator for all nursing homes located in the State.[45] To achieve licensure, one had to prove he was quali-

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40 At P. 14, Petitioner quotes from **Columbus Board of Education v. Pennick,** 443 U.S. 449 (1980), to support this claim. But the brief exerpt set forth at P. 14 does not fully dispose of an inquiry into an allegation that the Constitution has been violated. As this Court also noted, "disparate impact and foreseeable consequences, without more, do not establish a constitutional violation." 443 U.S. 464.

41 **Personnel Administrator of Massachusetts v. Feeney,** 442 U.S. 256, 279, note 25 (1979).

42 *Id.*

43 Petitioner also relies on **Richardson v. Pennsylvania Department of Health,** 561 F.2d 489 (3rd Cir., 1977) to support this claim. The exerpt quoted correctly states the law — that disproportionate impact *may* be *evidence* of illegal purpose. But evidence is not synonymous with proof. **Feeney,** 442 U.S. 256, 279, note 25 (1979).

44 See **Miami County v. Dayton** (1915), 92 Ohio St. 215, 223-4, 110 N.E. 726, 729.

45 Section 4751.02(A) of the Ohio Revised Code.

fied by passing an examination[46] that posed questions relative to the competent operation of a nursing home. There is no question that this test was job-related, as Petitioner's own witness so testified. BENHA submits that the State of Ohio's interest in providing quality care to residents in nursing homes by requiring licensees to pass a test relevant to that purpose outweighs Petitioner's claim that BENHA should have attempted to validate this test to prevent what she alleges is purposeful discrimination.[47]

In **Woodard v. Virginia Board of Bar Examiners,**[48] a challenge similar to Petitioner's was made against the Virginia Bar Examination under Title VII of the Civil Rights Act of 1964, as amended.[49] That Court found no violation of Title VII, noting the broader purpose served by professional licensing examinations as opposed to those tests given to employees as part of traditional employment practices.[50] In lieu of the more lenient standard of proof for Plaintiffs under a Title VII claim then for one brought directly under the Constitution,[51]

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46 Section 4751.04(A)(2) of the Ohio Revised Code and Section 4751-1-06 of the Ohio Administrative Code.

47 "(T)he states have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. **Goldfarb v. Virginia State Bar,** 421 U.S. 773, 792 (1975).

48 420 F. Supp. 211 (E.D. Va., 1976), *aff'd,* 598 F.2d 1345 (4th Cir., 1979).

49 42 U.S.C. Section 2000e *et seq.*

50 420 F. Supp. 211, 214.

51 "Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challeged practices. ... However this process proceeds, it involves a more probing judicial review of and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and Fourteenth Amendments in cases such as this." **Washington v. Davis,** 426 U.S. 229, 246-8 (1976).

BENHA submits that if a state's interest in licensing examinations can withstand a claim of disproportionate racial impact under Title VII, then it readily passes muster under the Constitution.

The cases cited by Petitioner in her brief[52] supporting her claim that BENHA was required to validate its licensing examination are likewise Title VII cases, and not applicable when considering a constitutional violation, which requires proof of discriminatory purpose.[53] In addition, the evidence of disproportionate impact in those cases Petitioner cites was much greater than in the case at bar.[54] Petitioner contends that BENHA should have used "standard techniques" to validate its licensure test, but the Constitution mandates no such endeavor.[55] And Title VII, which BENHA concedes does require such validation of general employment tests, does not reach a state licensure exam.[56]

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52 P. 15.

53 A fact which all three of these cases pointed out. **Vanguard Justice Society v. Hughes,** 471 F. Supp. 670, 701 (Md., 1979); **Scott v. City of Anniston, Alabama,** 597 F.2d 897, 899 (5th Cir., 1979); **Blake v. City of Los Angeles,** 595 F.2d 1367, 1378 (9th Cir., 1979).

54 In **Blake v. City of Los Angeles,** 595 F.2d 1367 (9th Cir., 1979) a municipal police regulation operated to totally exclude women from regular patrol work. In **Scott v. City of Anniston, Alabama,** 597 F.2d 897 (5th Cir., 1979), the Defendant City's Department of Public Works was departmentalized into 26 different positions. Black employees were found in only the three largest classifications, where the least degree of skill was required and the greatest number of employees was concentrated. In **Vanguard Justic Society v. Hughes,** 471 F. Supp. 670 (Md., 1979), use of an entry level test by the Baltimore police department produced a black pass rate only 66% of the white rate for the years 1973-76.

55 "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes (.)...

"Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute. . .should await legislative prescription." **Washington v. Davis,** 426 U.S. 229, 248 (1976). See also notes 47 and 48.

56 See **Woodard v. Virginia Board of Bar Examiners,** 420 F. Supp. 211 (E.D. Va., 1976), *aff'd* 598 F. 2d 1345 (4th Cir., 1979) and the cases cited therein.

CONCLUSION

Based upon the foregoing, Respondent Board of Examiners of Nursing Home Administrators respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was sent by regular U.S. Mail to Mr. Richard F. Swope, 6810 East Main Street, Reynoldsburg, Ohio 43068 on this _____ day of February, 1980.

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